(8)

No. 90-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONER

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May 1, 1991

QUESTIONS PRESENTED

I. Do the procedural safeguards mandated by the first and fourteenth amendments to the United States Constitution for the exaction of bar dues required as a condition of the practice of law include:

   A. pre-collection reduction of an objecting attorney's dues to that amount which the state bar expects to use for purposes it can constitutionally charge to him; and,

   B. pre-collection disclosure of the basis for the part of dues that will be used for lawfully chargeable purposes, rather than merely post-collection notice of particular political and ideological positions taken by the bar?

II. Does a requirement that an attorney object to specific political and ideological positions when taken by the bar, rather than state one general objection to any use of his compulsory bar dues for constitutionally objectionable purposes, unduly burden the exercise of his first- and fourteenth-amendment right to challenge the amount that he must pay?

III. Is the burden of proof under this Court's applicable decisions impermissibly shifted from the bar to the objector when an attorney is denied a refund of the part of his compulsory dues spent for constitutionally nonchargeable purposes in the past, because he did not present evidence as to that portion, even though his complaint states a valid cause of action challenging such expenditures and requests declaratory, injunctive, and "all other relief to which [he] appears to be entitled," and he repeatedly asked the district court to hold an evidentiary hearing to determine the amount of the refund due him?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included as respondents the Members of the Board of Governors of the Florida Bar, identified in the complaint as: Patrick G. Emmanuel, Thomas M. Ervin, Jr., David V. Kerns, Thomas W. Brown, John M. McNatt, Jr., Rutledge R. Liles, Robert E. Austin, Jr., F. Wallace Pope, Jr., Louie N. Adcock, Jr., William E. Loucks, Stephen A. Rappenecker, William Trickel, Jr., Dan H. Honeywell, Robert E. Pyle, Phyllis Shampanier, Theodore Klein, Barry R. Davidson, Stephen N. Zack, Alan T. Dimond, Robert E. Livingston, Michael Nachwalter, George A. Dietz, J. Fraser Himes, Barry A. Cohen, Rowlett W. Bryant, Joseph J. Reiter, Sidney A. Stubbs, Jr., Joe F. Miklas, Ray Ferrero, Jr., Harry G. Carratt, Drake M. Batchelder, Elting L. Storms, Ben L. Bryan, Jr., J. Dudley Goodlette, Edwin Marger, Neil J. Berman, and Edwin P. Krieger, Jr.; and in the Initial Brief of Appellant at ii in the court of appeals as: William H. Clark, Thomas M. Ervin, Jr., Crit Smith, S. Austin Peele, Joseph P. Milton, A. Hamilton Cooke, Robert E. Austin, Jr., James A. Baxter, Kenneth C. Deacon, Jr., William F. Blews, Horace Smith, Jr., Robert O. Stripling, Jr., John Edwin Fisher, Chandler R. Muller, David B. King, R. Kent Lilly, Patricia A. Seitz, Edward R. Blumberg, Sandy Karlan, Manuel A. Crespo, Michael Nachwalter, Alan T. Dimond, John W. Thornton, Jr., Robert M. Sondak, Stuart Z. Grossman, Joseph H. Serota, Daniel A. Carlton, Benjamin H. Hill III, Gary R. Trombley, Thomas M. Gonzalez, C. Douglas Brown, Patrick J. Casey, Arthur G. Wroble, H. Michael Easley, Joe F. Miklas, James Fox Miller, Roger H. Staley, Terrence Russell, Walter G. Campbell, Jr., Thomas G. Freeman, George H. Moss II, John A. Noland, William L. Guzzetti, Harry W. Dahl, Frederick J. Bosch, David W. Bianchi, Ladd H. Fassett, Wilhelmina L. Tribble, and Ruth Ann Bramson.

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OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit (Petition Appendix ("P.A.") 1a, 17a) are reported at 906 F.2d 624; its unreported judgment is reprinted in the Joint Appendix ("J.A.") at 63. There was no formal opinion of the United States District Court for the Northern District of Florida; its unreported final order is reproduced in the Petition Appendix at 22a.

An opinion of the court of appeals on an earlier appeal (P.A. 24a) is reported at 798 F.2d 1564. The unreported decision of the district court reversed on that appeal is reprinted in the Petition Appendix at 35a.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. J.A. 64. A petition for rehearing, timely under Eleventh Circuit Rule 40-2, was denied on October 5, 1990. P.A. 43a. On November 26, 1990, Associate Justice Anthony M. Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 17, 1991. Order (U.S. No. A-386). The petition was filed on January 10, 1991, and this Court granted the writ on March 18, 1991. 59 U.S.L.W. 3503, 3635. The jurisdiction of this Court rests on 28 U.S.C.A. § 1254(1) (West Supp. 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article V, § 15 of the Florida Constitution provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

STATEMENT OF THE CASE

The Florida Supreme Court has dictated by rule that to practice law in Florida an individual must be a member in good standing of respondent Florida Bar ("the Bar"). The rules regulating the Bar also require that, to maintain good standing, members must pay annual dues on or before July 1 of each year. P.A. 25a; Fla. Stat. Ann., Rules Regulating Bar, Rule 1-3, -7.3 (West Supp. 1990). Petitioner Robert E. Gibson is a member in good standing of the Bar. P.A. 26a.

The purposes declared by the Florida Supreme Court for the Bar are "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Fla. Stat. Ann., Rules Regulating Bar, Rule 1-2 (West Supp. 1990). One program for which the Bar uses dues is the taking and advocacy of positions on political and ideological issues, including ballot questions, through lobbying, publications, and speeches by Bar officials. P.A. 25a & n.1, 36a. When the Bar announced opposition to a ballot question actively supported by Mr. Gibson that would have limited state taxes and other revenues, he brought this action under 42 U.S.C. § 1983. P.A. 26a, 35a.

The complaint alleges that the Bar's general practice of funding political advocacy with dues violates Mr. Gibson's first-amendment rights of free speech and association. P.A. 1a-2a; J.A. 9-11.[1] Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3) (1982). P.A. 35a; J.A. 15-17. The complaint requests declaratory, injunctive and "all other relief to which Plaintiff appears to be entitled." J.A. 7, 9, 12.

At a bench trial, Mr. Gibson proved that, in addition to opposing the tax-limitation measure that precipitated his suit, the Bar had, *inter alia*, "espoused the following positions: (1)

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[1] In addition to the Bar, the members of its Board of Governors are named as defendants. P.A. 1a; J.A. 7-8.

opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers." P.A. 25a n.1; *see* J.A. 18-24. Nonetheless, the district court entered judgment for the Bar. P.A. 26a, 35a-42a. The court held that the "intrusion into plaintiff's rights occasioned by the Bar's legislative program" is justified by the state's interests in improving the administration of justice and advancing the science of jurisprudence and is sufficiently closely drawn, because the Bar had a policy that its Board of Governors must determine that legislation to be supported or opposed is related to those purposes. P.A. 41a.

Mr. Gibson appealed, and the court of appeals reversed. It ruled that, because first-amendment rights are at stake, the district court erred in relying on the existence of the policy and procedures by which the Bar took political and ideological positions. Rather, the court of appeals held, the Bar has the burden of proving that the actual past positions taken by it "were sufficiently related to its purpose of improving the administration of justice," *i.e.*, that they "relate directly" to "the role of the lawyer in the judicial system and in society." P.A. 32a-33a. The action was remanded for further proceedings consistent with the court of appeals' opinion. P.A. 34a.

On remand, Mr. Gibson sought a preliminary injunction, pending a hearing to determine the damages due him for past unconstitutional use of his dues. He asked that the injunction prohibit further spending of his dues for purposes beyond those authorized by the court of appeals and require the Bar to implement a procedure complying with *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). J.A. 24-26. In response, the Bar amended its policy to include a procedure by which members objecting to legislative positions may obtain post-collection refunds of part of their dues and moved for "judgment on the mandate" on the ground that its procedure satisfies the requirements set out in *Hudson*. J.A. 29-30.

Mr. Gibson opposed the Bar's motion. He contended that the new procedure is inadequate under *Hudson* and that, before any final judgment can be entered, he is entitled to an evidentiary hearing on the issue of damages for past improper uses of his dues. J.A. 30-31. At a hearing on the Bar's motion, Mr. Gibson presented evidence that the Bar continued to use his dues for a broad range of lobbying purposes not permitted by the court of appeals' decision and again asserted that the court must determine the damages due him for past unconstitutional spending. J.A. 32-39. However, the district court merely ordered the proceedings held in abeyance for seventy days to permit the Florida Supreme Court to take action concerning the Bar's amended policy. J.A. 39-40.

The Bar later reported that it could not obtain the Florida court's approval within the seventy-day period. J.A. 40-41. Mr. Gibson then renewed his motion for injunctive relief and repeated his contention that "the element of damages" remains and "require[s] an evidentiary hearing." J.A. 41-42. The district court refused to rule on Mr. Gibson's motion and twice extended the period within which the case was stayed, until the Bar's procedure was incorporated in a bylaw amendment and approved by the Florida Supreme Court. J.A. 43-44, 47-48. That approval was given in *Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies)*, 526 So. 2d 688 (Fla. 1988) (J.A. 48-49).

Under the amended bylaw, when the Bar adopts a legislative position, it publishes notice of that action in the next issue of the twice-monthly *Florida Bar News*. A member has forty-five days from the notice's publication to "file with the executive director a written objection to a particular position on a legislative issue." The bylaw specifies that failure to object within that period "shall constitute a waiver of any right to object to the particular legislative issue." After an objection is received, the Bar's executive director determines and puts in escrow the pro rata amount of the objector's dues placed in dispute by his objection pending determination of its merits. The Board of Governors then has forty-five days to decide whether to refund that amount or refer the objection to binding arbitration as to "whether the

legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues" or must be subject to a refund, with interest. P.A. 6a n.8, 8a-9a.

After hearing argument on Mr. Gibson's still pending motion for injunctive relief, the district court entered a final order denying his motion and dismissing the action on the ground that the amended bylaw "meets the safeguards and requirements necessary for protection of members' first amendment rights." P.A. 22a-23a. Mr. Gibson again appealed. This second appeal challenges the constitutionality of the Bar's amended bylaw and the district court's failure to order a refund of the part of his dues spent for constitutionally objectionable purposes in the past. P.A. 8a-9a & n.11.

The court of appeals affirmed in substantial part, holding that the amended bylaw is constitutional, in all but one minor respect, and that Mr. Gibson is not entitled to damages. P.A. 9a n.11, 13a-16a. Circuit Judge Clark, dissenting, agreed with Mr. Gibson that this Court's precedents concerning compulsory union and bar dues require an advance reduction, rather than a refund, and prohibit requiring objections issue-by-issue, and that Mr. Gibson is entitled to a remedy for past unconstitutional expenditures. P.A. 17a-21a.

SUMMARY OF ARGUMENT

This Court's decisions establish that the first amendment limits the purposes for which a state bar or labor organization may spend monies paid by an individual as a condition of the practice of law or employment. The Court also has held that, to collect coerced dues or fees, a bar or union must implement procedural safeguards that protect the individual's right to refrain from subsidizing constitutionally nonchargeable activities. The Court has not yet explicitly defined those procedures in the bar context. But, in the union context, in *Hudson*, it did so and declared that procedures designed to protect the first-amendment right not to speak and not to associate must be carefully tailored.

Because the individual's rights are identical in the two contexts, and the state interests are of the same weight, the procedure in the bar context must be equally carefully tailored and provide at least the same protections as those that *Hudson* prescribed in the union context. The procedures adopted by the Bar and upheld by the lower courts in this case fail that test in four respects.

First, they do not provide a pre-collection reduction of an objecting attorney's dues to that amount which the Bar reasonably expects to spend on constitutionally chargeable purposes. Such a reduction is required by *Hudson*, as all other courts of appeals addressing the issue have held. It is necessary, because *collection* of compulsory dues or fees by a membership association *inherently* infringes on first-amendment rights, and because even temporary collection of amounts to which the association has no valid claim unjustifiably deprives the individual of his own property and insures that he cannot use it for causes that he supports. Any burden that calculating an advance reduction, based on the prior year's expenses, might impose on the Bar is insufficient to justify the infringement on individual constitutional rights that occurs absent such a reduction.

Second, the scheme here does not provide an independently verified disclosure to potential objectors of the basis for the portion of dues that the Bar expects to use for constitutionally chargeable purposes, as *Hudson* requires. Instead, the Bar merely publishes a notice of its action each time that it takes a position on a political or ideological issue, disclosing neither whether it considers the activity chargeable nor what portion of the dues is involved. The inadequacy of those notices is not cured by the Bar's annual publication of a "breakdown" of its budget. That "breakdown" also does not explain which expenditures the Bar considers chargeable and why, which is what an attorney needs to know to decide intelligently whether to object or not.

Third, the Bar does not permit a general, standing objection to any use of a member's dues for constitutionally objectionable purposes. Instead, the Bar requires the member to monitor its

twice-monthly publication for notices of the taking of positions on political and ideological issues and to object to the specific position(s) every time notice is published. That requirement violates the mandate of *Hudson* that the procedure for objection facilitate, not discourage, dissent. It is also contrary to the explicit holding of *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), that requiring specific objections invades the individual's right to privacy of belief and is unduly burdensome.

Fourth, the Bar's procedure does not give attorneys notice of the reduced dues amount and opportunity to object and put disputed amounts in escrow before the Bar obtains use of them. Instead, the Bar first collects full dues and only later gives notice and provides escrow after it has taken positions on legislative issues and, thus, spent part of the dues on the disputed activity. However, as all other courts of appeals that have addressed the issue have held, *Hudson* requires that the notice which triggers escrow *precede* the collection of any compulsory fees. This defect in the Bar's procedures is not cured by the fact that the Bar may later make a rebate, because *Hudson* prohibited schemes which permit even temporary spending of objectors' dues for constitutionally impermissible purposes.

Finally, the lower courts erred in denying Mr. Gibson a trial to determine how much of his dues was misspent in the past. Under this Court's applicable decisions, his general prayer for relief is sufficient to state a claim for a refund, and the Bar had the burden of proving what proportion of his compulsory dues was used for constitutionally chargeable purposes. Mr. Gibson repeatedly requested a trial on the issue. But, he was improperly denied one when the district court dismissed the case because it found that the Bar's procedures satisfy *Hudson*. That dismissal cannot be justified on the alternative ground raised by the Bar, that it is a "state agency" immune from damages under the eleventh amendment to the United States Constitution. This Court has held that another state bar, possessing the same characteristics as the Florida Bar, is not a "state agency" for purposes of federal constitutional law.

ARGUMENT

I. THE PROCEDURES FOR COLLECTING COMPULSORY DUES MUST BE CAREFULLY TAILORED, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS

Last Term, this Court held in *Keller v. State Bar*, 110 S. Ct. 2228 (1990), that the first amendment limits the purposes for which an "integrated" or "unified" state bar may exact dues which members pay as a condition of the practice of law. The use of compulsory bar dues to finance political and ideological activities to which an attorney objects violates his first-amendment rights of free association and speech when such expenditures are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 2233-37 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

The Court also held that as a pre-condition to collecting compulsory dues an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*," a case involving compulsory union fees. Because the state bar in *Keller* had no procedures for dealing with objections, the Court did not determine there "whether one or more alternate procedures would likewise satisfy that obligation." *Id.* at 2237-38. This case presents such significant questions of first-amendment due process for the first time in the context of the compulsory bar.

Freedoms guaranteed by the first amendment are "rights which we value most highly and which are essential to the workings of a free society." In protecting first-amendment rights, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357

U.S. 513, 520-21 (1958); *see Hudson*, 475 U.S. at 303 n.12. Consequently, in *Hudson*, 475 U.S. at 302-03 & n.11 (emphasis added) (footnote omitted), the Court relied on *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion), and other earlier statements of the rule of first-amendment strict scrutiny, for the holding that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be *carefully tailored* to minimize the infringement.

Self-evidently, the "First Amendment does not distinguish between lawyers and other occupations." *Arrow v. Dow*, 544 F. Supp. 458, 460 (D.N.M. 1982). And, the state's interest purportedly served by a mandatory bar is no weightier than the governmental interest that agency-shop arrangements are thought to serve. *Keller*, 110 S. Ct. at 2236. Thus, because there is "a substantial analogy" between the integrated bar and compulsory union fee arrangements, the Bar is "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 2235. Here then, as well as in the union context, the first amendment requires careful tailoring of the procedure. However, the Bar's procedure fails that test in several respects.

II. IN NOT REQUIRING AN ADVANCE REDUCTION, THE PANEL MAJORITY'S DECISION IGNORES THE FACT THAT AN IMPORTANT PURPOSE OF THE *HUDSON* PROCEDURES IS TO AVOID EXCESSIVE COLLECTION

The panel majority held, with Judge Clark dissenting, that the Bar need not provide an objector an advance reduction for the proportion of dues that it expects to use for political activity, because "an interest-bearing escrow account (along with an

otherwise satisfactory procedure) is sufficient." P.A. 13a-14a; *contra* P.A. 17a-21a & n.3 (Clark, J., dissenting). That holding conflicts with this Court's decision in *Hudson*.

The panel majority relied on the fact that *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984), identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." *See* P.A. 14a. However, as Judge Clark said, P.A. 18a, the "majority simply misreads" *Hudson* in not recognizing that the later case requires *both* escrow *and* advance reduction.

As *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did *not* decide whether an interest-bearing escrow account without advance reduction would be constitutionally sufficient. *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of objectors' service fees. This Court held that *in addition* to that escrow, and other safeguards, an "appropriately justified *advance reduction* * * * *[is] necessary* to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. It would hardly have been necessary for the Court to hold that the union must "provide *adequate justification* for the advance reduction of dues," *id.* at 309 (emphasis added), if, as the panel majority here said, no advance reduction at all were required.

The basic flaw in the panel majority's reasoning is its failure to recognize that "'preventing compulsory subsidization of ideological activity'" was not the *sole* "'objective' of the procedures" that *Hudson* mandated. *See* P.A. 11a (quoting *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). Were that true, *Hudson*, 475 U.S. at 310 (emphasis added), need not have announced "constitutional requirements for the Union's

collection of agency fees," and would have prescribed only *post*-collection protections. But *Hudson* required more. The Court agreed that the union's 100% escrow "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes." *Id.* at 309. Nonetheless, it did not hold that the only other safeguard needed was an impartial decision-maker to determine how much the union could lawfully spend.

Rather, *Hudson* also required *pre*-collection protections: an "appropriately justified advance reduction" to an amount that includes only clearly or arguably chargeable costs and advance disclosure of the basis for that amount. *See id.* at 306-07, 309-10. The Court found those pre-collection safeguards necessary for two reasons: first, "because the agency shop *itself*"—*i.e.*, the collection of compulsory union fees even for constitutionally permissible purposes—"impinges on the nonunion employees' First Amendment interests," *id.* at 309 (emphasis added); and, second, because "the procedures required by the First Amendment also provide the protections *necessary* for any *deprivation of property*," *id.* at 304 n.13 (emphasis added).

A requirement that objectors pay into escrow monies to which a union or bar undoubtedly is not entitled is both an unjustifiable burden on the objectors' right to their own property and an infringement upon first-amendment interests. As Justice Brennan said in *Elrod*, 427 U.S. at 355-56, a likely consequence of the compelled financial exaction is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." *Accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970).

All other United States courts of appeals that have considered the question have concluded, contrary to the panel majority, that an advance reduction is constitutionally required under *Hudson*.

In *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991), the court explained that the

> core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*. • • •
>
> • • • [T]his underpinning principle mandates that the union follow required procedures in advance of assessing a fee • • • .

Two different panels of the Sixth Circuit court of appeals have ruled that

> *Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological purposes.

Damiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents *non*chargeable expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

The Ninth Circuit has explicitly rejected the view of the panel majority in this case and followed the Sixth Circuit to "hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir.

1990) (2-1 decision).[2] A procedure under which the union collects more than "a reasonable estimate of the percentage of fees attributable to" constitutionally chargeable costs is not the "carefully tailored" procedure required by *Hudson*, 475 U.S. at 303, for the collection of compulsory fees. *Grunwald*, 917 F.2d at 1228. *See also Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991) (where a union had no *Hudson* procedures at all, a nonmember was justified in unilaterally reducing his agency fees, and his discharge for doing so was unlawful).

Hudson and its progeny cannot be distinguished on the theory, advanced in the court of appeals, "that when Bar dues are assessed * * *, the Bar does not yet know what political activity it will undertake in the coming year." P.A. 13a-14a. That is equally true when a union sets its dues amount before a fiscal year begins. *Hudson*, 475 U.S. at 307 n.18, took that fact into account by permitting the advance reduction to be based on the *preceding year's* expenditures.

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[2] *Grunwald*, 917 F.2d at 1227, though, incorrectly cites *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989), and *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. *Crawford*, 870 F.2d at 161, so held, but was vacated by the grant of rehearing en banc. *See id.* at 155; 4th Cir. R. 35(c). Another panel of the Fourth Circuit has since concluded, in *Dashiell*, 925 F.2d at 756, that pre-collection calculation of a reduced fee is required. *Hohe*, 868 F.2d at 70, 74 n.7, was decided on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits"; moreover, the procedure in *Hohe* provided an advance reduction, *see Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989). Advance reduction also was not an issue, and apparently was part of the procedure, in *Andrews*, 829 F.2d at 337-41. *Cf. Price v. Auto Workers*, 136 L.R.R.M. (BNA) 2641, 2643 (D. Conn. 1990) (a union that "collected fees from [nonmembers] without discounting the amount for any percentage expended on matters unrelated to collective bargaining, contract adjustment, and grievance adjustment" violated its duty of fair representation under *Communications Workers v. Beck*, 487 U.S. 735 (1988)).

Indeed, *Keller* agreed that a bar would not have to determine whether the expenditure will be chargeable "'prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter.'" But, it held, the "'burden or inconvenience'" of performing that analysis once a year for all of its expenditures and giving it to all members *before* collecting their annual dues "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)); *see Hudson*, 475 U.S. at 306-07; *see also Ellis*, 466 U.S. at 444 ("administrative convenience" is not sufficient justification for denying objectors an "advance reduction of dues and/or interest-bearing escrow accounts").

Thus, the panel majority erred in holding that the Bar's procedure satisfies *Hudson*, even though that procedure does not afford objecting attorneys a pre-collection reduction of their dues to only that amount which the Bar expects to use for purposes it can constitutionally charge to them.

III. IN NOT MANDATING NOTICE OF THE REDUCED DUES AMOUNT BEFORE DUES ARE COLLECTED, AND IN REQUIRING ATTORNEYS TO OBJECT EACH TIME THE BAR TAKES A POLITICAL OR IDEOLOGICAL POSITION, THE PANEL MAJORITY'S DECISION DENIES ATTORNEYS A FAIR OPPORTUNITY TO OBJECT AND PERMITS TEMPORARY MISSPENDING

Under the Bar's scheme, members must pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Fla. Stat. Ann., Rules Regulating Bar, Rule 1-7.3, 2-6.2 (West Supp. 1990). Later, during the fiscal year, the Bar gives notice each time that it takes a position on a legislative issue, and members must within forty-five days file an objection to that particular position or waive their right to object. Only then is some portion of the dues escrowed and, possibly, rebated. P.A. 6a n.8, 8a-9a. The panel majority, with Judge Clark

dissenting, held that rebate scheme constitutional, despite the lack of pre-collection notice and the requirement of multiple, issue-by-issue objections. P.A. 15a-16a; *contra* P.A. 20a-21a & n.4 (Clark, J., dissenting). That ruling conflicts with this Court's decisions in *Hudson* and the other, earlier compulsory union fee cases on which *Keller* relied.

The minimum "constitutional requirements for the * * * collection of [compulsory union and bar] fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310; *see Keller*, 110 S. Ct. at 2237. The scheme approved by the panel majority satisfies *none* of these requirements.

A. Adequate Notice Requires an Audited Explanation Of the Calculation of the Chargeable Amount

Under the Bar's procedure, potential objectors are provided inadequate information about the basis for the portion of dues that the Bar claims they must pay. *Hudson*, 475 U.S. at 306, held that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*." Adequate disclosure requires a union seeking to collect a compulsory fee to "identif[y] the [major categories of] expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers," verified "by an independent auditor." Merely identifying expenditures for purposes the union concedes cannot be charged to objectors "was not an adequate disclosure of *the reasons why* they were required to pay" the portion of dues demanded. *Hudson*, 475 U.S. at 306-07 & n.18 (emphasis added).

In the bar context, adequate explanation of the basis for what an objecting attorney must pay includes the major categories

of expenses, verified by an independent auditor, that the bar claims "are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" *Keller*, 110 S. Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). As *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 & n.22 (1st Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. Mar. 20, 1991) (No. 90-1470), held, an integrated bar must provide members with a notice "that classifies activities as appropriate or inappropriate for mandatory financing" and supports the percentage of dues that the bar claims to be chargeable to objectors.

Such an explanation obviously is not provided by periodic notices which merely report that the Bar has taken a legislative position. Indeed, the Bar's notices provide far *less* information than the disclosure held constitutionally inadequate in *Hudson*, 475 U.S. at 306-07, which at least told nonmembers what part of a member's dues they were not required to pay. Here, an attorney must object even to find out whether the Bar claims that expenditures concerning the legislation in question are chargeable and what portion of his dues are used to fund that activity. *See* P.A. 6a n.8.

In its Brief in Opposition to Petition for Writ of Certiorari ("Opposition") at 5, the Bar contended that any deficiency in its periodic notices is cured by the fact that it provides members notice of its budget and "annually publishes a complete breakdown of expenditures by specific category," with percentages and dollar amounts.

However, *Hudson*, 475 U.S. at 306-07 (emphasis added), held that to be adequate the disclosure must "*identif[y] the expenditures* for collective bargaining and contract administration * * * *for which nonmembers as well as members can fairly be charged* a fee." Merely furnishing a copy of a union's basic financial statement or budget does not satisfy that requirement. *See Tierney*, 824 F.2d at 1501, 1506 (budget); *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 940-41 (C.D. Cal.

1990) (financial statement); *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989) (financial statement); *Gillespie v. Willard City Bd. of Educ.*, 700 F. Supp. 898, 900-02 (N.D. Ohio 1987) (budget); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986) (budget), *aff'd on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990); *Harrison v. Massachusetts Soc'y of Professors*, 405 Mass. 56, 63-64 & n.8, 537 N.E.2d 1237, 1242 & n.8 (1989) (financial report).

More is required, "because audited financial statements [and budgets] typically do not involve verification for expenditure categories based on the types of activities pertinent to the *Hudson* notice (representational vs. political/ideological)." *Mitchell*, 744 F. Supp. at 941. To satisfy *Hudson*, the notice must explain which expenditures the organization demanding the fee considers chargeable and why: "The whole point of providing the notice [to] nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require a breakdown between chargeable and nonchargeable costs." *Hohe*, 727 F. Supp. at 167; *accord Mitchell*, 744 F. Supp. at 940-41; *see Schneider*, 917 F.2d at 634-35 & n.22; *Tierney*, 824 F.2d at 1504; *Ellis v. Western Airlines*, 127 L.R.R.M. (BNA) 2550, 2552-53 (S.D. Cal. 1987); *Lehnert*, 643 F. Supp. at 1331; *Harrison*, 405 Mass. at 64 n.8, 537 N.E.2d at 1242 n.8.

The Bar's budget and "breakdown" of expenses do not meet that requirement, because, like the financial statements and budgets found inadequate in the union cases, they do not identify expenses as chargeable or not. The breakdown published in the September, 1988, *Florida Bar Journal*, which was attached to the Bar's brief in the court of appeals, is reproduced in the Joint Appendix at 60-62. It reveals only what the Bar spends in total on, *e.g.*, "Public Information," "Public Interest Programs," and "Legislation." It does *not* anywhere give "the potential dues reimbursement figure," as the Opposition at 6 disingenuously said. Nor does it tell potential objectors the portion of each category that the Bar considers chargeable, much less "the reasons why they were required to pay their share of" those expenditures, as *Hudson*, 475 U.S. at 307, mandates.

B. The Requirement of Multiple Objections Unduly Burdens the Exercise of the Right to Object

In requiring an objection *every time* the Bar takes a legislative position, the Bar's scheme fails to provide "an expeditious, fair, and objective" means of challenging the amount of the dues before an impartial decisionmaker. Because first-amendment rights are at stake, the procedures for asserting objection must "facilitate [an individual's] ability to protect his rights." *Hudson*, 475 U.S. at 307 & n.20. That means they "must not be framed so as to discourage the exercise of * * * First Amendment rights by intimidation or the imposition of unrealistic and excessively complex procedural requirements." *Tierney*, 824 F.2d at 1503.

Not permitting a standing objection to all nonchargeable exactions unduly burdens the individual's ability to protect his first-amendment rights, as the Court explicitly held in *Abood*, 431 U.S. at 241 (footnote omitted):

> To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

The panel majority's assertion that the Bar's scheme does not confront an individual attorney with the dilemma identified in *Abood*, because an "objector need not provide any * * * information concerning the motivation for his objection or his own position concerning the legislative policy at issue," P.A. 15a-16a, is completely disingenuous. As *Abood*, 431 U.S. at 241 & n.42, explained, requiring an objector to specify the causes which he does not want to support financially "necessarily discloses, by negative implication, those causes [he] does support."

Moreover, regardless of what must be included in an objection, the Bar's scheme places on the individual attorney "the considerable burden of monitoring," *id.* at 241, the Bar's publication twice a month to determine whether it has taken positions on political, ideological, and other nonchargeable matters which he does not want to subsidize and of objecting every time it has.[3] A similar burden was found to be sufficient reason to invalidate the objection procedure of the integrated bar of Puerto Rico. *Schneider*, 917 F.2d at 634-35.

In its Opposition at 7, the Bar tried to justify imposing that burden on the individual, by asserting that the general objections approved in *Abood* would somehow place on it "an unfair burden" of "either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every" legislative or political issue on which the Bar presumes that it can spend objectors' dues. That argument is disingenuous, *because the Bar has precisely that burden under its existing scheme*. That is, if a member opposes use of his dues for *any* constitutionally nonchargeable purpose (as Mr. Gibson does, *see* P.A. 2a), carefully monitors the Bar's publication twice a month to determine when it engages in arguably nonchargeable activity, and objects and specifies the activity every time it does, then, under its own scheme, the Bar must either refund for all of those activities or pay for arbitration on every issue that he has challenged.

In short, the Bar's preference for multiple, specific objections can only be for the purpose of *discouraging* dissent. That purpose is, of course, contrary to not only *Abood*, but the mandate of *Hudson*, 475 U.S. at 307 n.20 (emphasis added), that the Bar provide procedures "that *facilitate* a [member's] ability to protect his rights."

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[3] The record shows that, to avoid waiving his rights under the Bar's scheme in 1986, *e.g.*, an attorney would have had to object at least *six* separate times and specify some twenty-nine legislative positions of the Bar which he did not want to support. *See* J.A. 32-35.

C. The Bar's Scheme Permits It to Spend Objectors' Dues for Constitutionally Impermissible Purposes

The notice and subsequent escrow under the Bar's scheme are untimely. One purpose of the disclosure "of the basis for the fee" and "escrow for the amounts reasonably in dispute" is to "avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson*, 475 U.S. at 305, 310. A "remedy which merely offers dissenters the possibility of a rebate does not avoid" that risk and thus is constitutionally inadequate. *Id.* at 305-06; *accord Ellis*, 466 U.S. at 443-44. In short, *Hudson* requires that the notice which triggers escrow *precede* the collection of any compulsory fees.[4]

The other federal courts of appeals that have addressed the issue in union cases have all held, contrary to the panel majority here, "that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." *Grunwald*, 917 F.2d at 1228 (9th Cir.); *accord Dashiell*, 925 F.2d at 754 (4th Cir.); *Dean*, 924 F.2d at 808 (9th Cir.); *Tierney*, 824 F.2d at 1503 (6th Cir.); *see also Harrison*, 405 Mass. at 64, 537 N.E.2d at 1242 ("If the financial information is to be useful to a nonmember's decision whether to pay the fee or to challenge it, the information must come with, or prior to, the agency fee demand").

Moreover, in *Schneider*, 917 F.2d at 634 (emphasis added), the First Circuit held that a bar's objection procedure was invalid under *Hudson*, because, like the scheme here, it did not oblige the bar "*at the outset of a dues year* to categorize its * * * actual anticipated expenditures" as chargeable or not so that individual

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[4] That is consistent with the usual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be *preceded by notice* and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)) (emphasis added); *see Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

attorneys have sufficient information to determine whether they wish to object.[5]

Under the Bar's procedure, notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. Thus, there is both a certainty that some portion of the dues will be spent on the *process of adopting* legislative positions, because notice is not even given until *after* that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. As Judge Clark understood, the "Bar plan is a pure rebate plan which * * * uses Gibson's dues until he complains," a feature which has "been declared unconstitutional in several Supreme Court cases." P.A. 21a (dissenting).

IV. THE PANEL MAJORITY ERRED IN DENYING A REFUND FOR PAST UNCONSTITUTIONAL SPENDING

A. That Ruling Conflicts with This Court's Decisions as To What Is a Sufficient Prayer for Relief and Who Has The Burden of Proof in Compulsory Fee Cases

The panel majority, with Judge Clark dissenting, denied Mr. Gibson a refund of the part of his compulsory dues that the Bar had already used to fund its nonchargeable political and ideological activities. P.A. 9a n.11; *contra* P.A. 19a-20a (Clark, J., dissenting). The majority declined to decide whether Mr. Gibson is entitled to a refund, because, it said, he "made no request for a refund or for monetary damages in his complaint; nor did he

[5] *Schneider* would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson*, *Damiano*, *Tierney*, and *Grunwald*. *Compare Schneider*, 917 F.2d at 634 *with supra* pp. 10-15. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

present any evidence on this issue at trial or on remand." P.A. 10a n.11. The first of those grounds for denying retroactive relief is clearly erroneous as a matter of fact, and both grounds are contrary to this Court's applicable decisions as a matter of law.

Mr. Gibson *did* request a refund or monetary damages, for his complaint prays for not only declaratory and injunctive relief, but also "all other relief to which Plaintiff appears to be entitled." J.A. 12. Moreover, *Abood*, 431 U.S. at 241-42 & n.43, held that such a "general prayer" for other relief is as a matter of law sufficient to entitle objecting compulsory fee payors "to appropriate relief, such, for example, as the kind of remedies described in" *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963). Those remedies included "the refund of a portion of the [past] exacted funds in the proportion that union political expenditures bear to total union expenditures." *Abood*, 431 U.S. at 240; *see id.* at 238.

The panel majority's denial of a refund on the ground that Mr. Gibson presented no evidence as to what refund he is due, P.A. 10a n.11,[6] assigns to him a burden of proof that is contrary to all of the Court's agency-shop decisions from *Allen* through *Hudson*. As summarized in *Hudson*, 475 U.S. at 306 & n.16 (emphasis added), the "nonmember's 'burden' is simply the obligation to make his objection known"; "*the union* retains the burden of proof" as to the proportion of its expenditures that are constitutionally chargeable. *Accord Ellis*, 466 U.S. at 457 n.15; *Abood*, 431 U.S. at 239-41 & nn.39-40; *Allen*, 373 U.S. at 118-19 & n.6, 122.

Apparently recognizing that the reasons stated by the panel majority were insufficient to deny Mr. Gibson's claim for monetary damages, the Bar's Opposition at 8 argued that there

[6] Mr. Gibson did present evidence, both before and after the remand, of political and ideological positions taken by the Bar in the past. *See* P.A. 25a n.1; J.A. 18-24, 32-37; *see also* J.A. 50-58 (affidavit of the Bar's executive director attaching a compilation of legislative positions of the Bar).

was another reason for the majority's ruling. The Bar there asserted that Mr. Gibson requested a refund of the portion of his dues expended for nonchargeable purposes "at the appellate level for the first time." That assertion is untrue.

Gibson's motion in the district court for injunctive relief pending final hearing said that a "money judgment" in the form of a rebate of the part of his dues "used for ideological purposes" is "clearly required" in addition to injunctive relief. J.A. 26. His response to the Bar's motion for final judgment explicitly requested that the Bar's motion be denied, because "it is necessary for the Court to receive further evidence" on issues other than the constitutionality of the Bar's rebate scheme before final judgment can be entered, "particularly damages for past improper uses of GIBSON's funds." J.A. 31.

Then, when the district court heard argument on the Bar's motion, Gibson argued that "the court must determine if the positions taken by the Bar in the past, * * * , through today's date, * * * were within the limited area" permitted by the court of appeals' first decision in this case and "fashion a remedy that will include restitution of moneys taken from Mr. Gibson unlawfully in the past." J.A. 36-37. And, his contention that "the element of damages" remains and "require[s] an evidentiary hearing" was stated for a fourth time when he renewed his motion for injunctive relief. J.A. 42.

In short, Gibson did not fail to raise the issue of damages in the district court on remand from the court of appeals' first decision. He raised it *repeatedly* and requested an evidentiary hearing on the issue, but was denied that hearing when the district court held that the Bar's scheme satisfies *Hudson*, denied his motion for injunctive relief, and dismissed the case on the erroneous ground that "no subsequent proceedings are necessary." P.A. at 22a-23a. Therefore, the question of the propriety of that ruling is properly before this Court, and it is erroneous under the Court's applicable precedents.

B. *Keller* Forecloses the Bar's Claim That It Is a "State Agency" Possessing Eleventh-Amendment Immunity

In its Opposition at 8-9, the Bar argued that it is "a 'state agency'" and, as such, immune from damages under the eleventh amendment. While that contention was questionable even before *Keller*,[7] it is clearly without merit now.

The Bar claims to be a state agency, because the Florida Supreme Court declared by order that the Bar is "'an official arm of the Court.'" Opposition at 9 (quoting Fla. Stat. Ann., Rules Regulating Bar, ch. 1 (West Supp. 1990)). However, "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). *Keller*, 110 S. Ct. at 2234, held that the California Supreme Court's ruling that the California Bar is a state agency is "not binding on us when such a determination is essential to the decision of a federal question."

What is a state agency for purposes of the first or eleventh amendment clearly is a federal question. The answer to that question "depends, at least in part, upon the nature of the entity created by state law." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977). *Keller*, 110 S. Ct. at 2234-35, held that the California Bar is not a "government agency" for purposes of

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[7] *Levine v. Wisconsin Supreme Court*, 679 F. Supp. 1478, 1487-88 (W.D. Wis.), *rev'd on other grounds sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989), held that the Wisconsin Bar is not a state agency immune under the eleventh amendment from damages for the misuse of compulsory dues, because its funds are not deposited in state accounts and "it is largely a self-governing entity." In contrast, *Krempp v. Dobbs*, 775 F.2d 1319, 1321 & n.1 (5th Cir. 1985), held, with far less analysis, that the Texas Bar is a state agency immune from suit. *Levine*, 679 F. Supp. at 1488 & n.3, distinguished *Krempp* on the ground that the Texas Bar is a state agency by virtue of state statute, unlike the Wisconsin (and Florida) Bar, which has that status only by declaration of the state's supreme court. *See* Opposition at 9. Under *Keller*, even compulsory state bars which have "state agency" status by virtue of statute probably have no immunity in a suit such as this.

federal constitutional law, "render[ing] unavailing [the] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." The Florida Bar possesses all of the characteristics on which *Keller* relied:

- "Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors." *Id.* at 2234; *see* Fla. Stat. Ann., Rules Regulating Bar 1-7 (West Supp. 1990); J.A. 60-61.

- "Only lawyers admitted to practice in the State of California are members of the State Bar, and all * * * lawyers admitted to practice in the State must be members." *Keller*, 110 S. Ct. at 2234-35; *see* Fla. Stat. Ann., Rules Regulating Bar 1-3 (West Supp. 1990).

- The services provided "for the State by way of governance of the profession" are "essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by * * * law to the State Supreme Court." *Keller*, 110 S. Ct. at 2235; *see* Fla. Const. art. V, § 15; Fla. Stat. Ann., Rules Relating to Admissions to Bar (West 1983 & Supp. 1990); Fla. Stat. Ann., Rules Regulating Bar 1-10, 3-1.2, 3-3.1, 3-7.6 (West Supp. 1990).

In sum, *Keller* conclusively establishes that the Florida Bar has no eleventh-amendment immunity in this action.

CONCLUSION

When a state compels an individual to pay a fee to a union or bar association as a condition of employment or the practice of a profession, it infringes on his or her rights of free speech and association. *See Keller*, 110 S. Ct. at 2233-36. This Court

confirmed in *Hudson*, 431 U.S. at 303, that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement."

As shown above, the decision of the court of appeals' panel majority in this case ignores that general rule of first-amendment law and approves procedures which omit important, minimum constitutional safeguards explicitly mandated by *Hudson* and its precursors. Moreover, the panel majority repudiates fundamental rules of pleading and of burden of proof which this Court has held necessary to protect individual rights in causes of action like this. Therefore, the judgments below should be reversed, and the case remanded to the district court with instructions to grant Mr. Gibson's motion for preliminary injunctive relief and to proceed to trial on the issue of the damages to which he is entitled for past unconstitutional use of his dues.

Respectfully submitted,

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